No. 14266

In the United States Court of Appeals for the Ninth Circuit

BERNARD BLOCH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PETITION OF THE APPELLEE FOR REHEARING

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
JOHN H. MITCHELL,
FRED G. FOLSOM,
GEORGE WILLI,
Special Assistants to the Attorney General.

JACK D. H. HAYS,
United States Attorney.

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CITATIONS

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The United States of America, appellee, respectfully requests that a rehearing be afforded in the above-entitled cause. In making this request, appellee seeks not affirmance of the conviction but modification of the Court's opinion of April 11, 1955.

The Court based its judgment of reversal on the finding that two of the trial court's instructions on "willfulness," given without objection by appellant at trial or even specification as error on appeal, constituted plain error affecting substantial rights. The Court also noted its disapproval of certain cross-examination by the Government prosecutor but did not find it necessary to decide whether this questioning amounted to prejudicial error because of its previous holding in respect to the instruction points.

The Government agrees with the correctness of the Court's reversal of the conviction but does so on the sole ground that reversal is warranted by the prejudicial error resulting from the prosecutor's cross-examination of appellant concerning (1) performance of illegal operations, (2) reporting of fees received from such operations, (3) indulgence in illicit relations with one Irene Crocker, and (4) denial of a medical license. Appellee respectfully insists, however, that there was no error in the trial court's instructions on intent and certainly no fundamental error therein. Accordingly, it is urged that the Court's judgment should stand but its reasoning in support thereof should be modified.

The Court has premised its judgment herein entirely on issues not previously raised by either party to this proceeding. A rehearing in the cause would therefore be highly appropriate in order to provide opportunity to supply the Court briefs and argument on those issues, hitherto untreated, that have now assumed determinative importance. Such a procedure would conform to the apparent objectives of Rule 18 (2) (d), Rules of the United States Court of Appeals for the Ninth Circuit. See, e. g., *Gordon* v. *United States,* 202 F. 2d 596, certiorari denied, 345 U. S. 998.

1. Although expressing its disapproval, the Court did not decide whether certain questions asked appellant on cross-examination concerning (a) performance of illegal operations (R. 382), (b) reporting of fees from illegal operations (R. 383), (c) illicit relations with named women (R. 380, 383) and (d)

refusal of a license to practice medicine (R. 384) constituted prejudicial error. In the same vein, the Court noted but did not pass on the prejudicial effect of questions asked the witness, Miss or Mrs. Nona Jokela (R. 128, 284), on cross-examination regarding cohabitation with appellant (R. 293–294) and trips made with him (R. 294). This examination occurred "before appellant ever took the stand" (Op. 7). These two distinct lines of questioning are discussed herein in reverse order.

The Government respectfully asserts that the questions put to the witness, Jokela, were proper cross-examination, *not* as attempts to elicit evidence bearing on *appellant's character,* but as relating to the issue of Jokela's credibility as a witness, more particularly to the question of her *bias* in appellant's favor. In evaluating the propriety of the questioning under consideration, it is important to note that the witness, under examination by appellant's counsel, had previously assumed full responsibility for initiating the record-keeping system employed by appellant (R. 128) and for the recording and handling of all patient fees (R. 130–132, 291–292). Appellant later testified to precisely the same effect. (R. 312–314.) The reporting of such fees for tax purposes was, of course, a principal issue of contention in the prosecution. The thrust of Jokela's testimony was entirely exculpatory of the appellant and therefore furnished adequate basis for cross-examination calculated to show bias occasioned by the witness' relationship to him. Questions concerning traveling (R. 294), residence (R. 293–294), and even cohabitation (R. 380) with ap-

pellant were proper subjects of cross-examination of both Jokela and appellant, not to show the bad character of either of them, but to show testimonial bias of the former. *Alford* v. *United States,* 282 U. S. 687, 692, 693–694; *Majestic* v. *Louisville & N. R. Co.,* 147 F. 2d 621, 627 (C. A. 6th); *Ewing* v. *United States,* 135 F. 2d 633, 638, 640 (C. A. D. C.), certiorari denied, 318 U. S. 776; *Kroger Grocery & Baking Co.* v. *Stewart,* 164 F. 2d 841, 844 (C. A. 8th); III Wigmore on Evidence (3d ed.), Secs. 948, 949.

On direct examination, appellant testified as to his concern with the problem of juvenile delinquency extant in his community and as to his personal efforts and substantial financial contribution directed to the alleviation of this problem. (R. 309–310.) Whether this self-glorifying line of testimony was relevant or material is open to question. But appellant's credibility in this respect was a proper predicate for cross-examination concerning whether he had experienced sexual relations with a particular juvenile. (R. 383.) *Walder* v. *United States,* 347 U. S. 62; *United States* v. *Bowcott,* 170 F. 2d 173, 176–177 (C. A. 7th); III Wigmore on Evidence (3d ed.), Sec. 891. To this extent the Government's cross-examination would not appear to have been erroneous and certainly not prejudicially erroneous.

The Government concedes, however, that the balance of the questions concerning (1) illegal operations by the appellant (R. 382), (2) the reporting of fees from such operations (R. 383), (3) his illicit relations with one Irene Crocker (R. 383), and (4) the refusal of a medical license to appellant (R. 384) were prej-

udicial. The prosecutor obviously asked these questions in the good faith belief that appellant's testimony concerning his past-presidency of the Junior Chamber of Commerce (R. 308–309), his construction of a skating rink to curb juvenile delinquency (R. 309–310), and his free medical services to indigent Mexicans (R. 310–312) had placed his character in issue. This Court correctly held that such testimony did not inject the defense of good character. (Op. 7.) No character evidence in the "reputation" sense of the word was offered. *Michelson* v. *United States,* 335 U. S. 469, 476–477. And absent such character evidence, "the state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Id.* p. 475. On this basis, the Government agrees that the reversal of the appellant's conviction is proper.

2. The trial court's instructions on "willfulness" were not error. In any event, those instructions did not constitute plain error. *Bateman* v. *United States,* 212 F. 2d 61 (C. A. 9th).

In the course of its careful and comprehensive charge, the court, in six distinct instances,[1] instructed

[1] "There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax." (R. 409.)

"The attempt to evade and defeat the tax must be a willful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which

the jury that to convict they must find that appellant intended to evade the payment of his income tax. Situated among those instructions was the following sentence (R. 410):

> The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly, and intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

The Court has noticed this sentence as fundamental error affecting substantial rights because the trial court told the jury, in effect, "that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return." (Op. 5.) The Government respectfully submits that this characterization of the instruction in question

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it was the duty of the defendant to pay to the Government." (R. 410.)

"The attempt must be willful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant." (R. 410.)

"It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving and that he wilfully and intentionally attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment." (R. 412.)

"If you find that a fraudulent return was filed, with intent to defeat a part or all of the tax due, and this was done wilfully, the crime is complete as soon as the filing takes place." (R. 413.)

"Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government." (R. 415.)

completely denies effect to the words "consciously, knowingly, and intentionally." If given effect, these words effectively preclude the construction that the Court has suggested. This Court has, itself, recently rejected such a construction. In *McFee* v. *United States,* 206 F. 2d 872 (C. A. 9th), the identical instruction was given (McFee R. 419) and not deemed plain error or error at all. In *Bateman* v. *United States, supra,* considering essentially the same question with which we are dealing here, this Court said (pp. 69–70):

> Appellants argue that the giving of the phrase, "the law presumes that every man intends the natural and probable consequences of his own voluntary acts," in effect instructed the jury that from the mere act of filing an incorrect return it may be presumed that appellants intended to evade their taxes. This is not the ground upon which the instruction was objected to in the trial court. Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., failure to except to an instruction on the ground urged on appeal foreclosures review of the question. *Berenbeim* v. *United States,* 10 Cir., 1947, 164 F. 2d 679.
>
> Although we would be justified in placing our determination of this question on the failure of appellants to comply with Rule 30, we deem it advisable to point out that the trial court correctly instructed on the element of intent.

The cases of *Wardlaw* v. *United States,* 203 F. 2d 884 (C. A. 5th), and *Morissette* v. *United States,* 342 U. S. 246, cited at page 4 of the Court's opinion, do

not support this Court's conclusion in respect to the instruction under consideration.

In both *Wardlaw* and *Morissette,* the rulings of the trial court had the effect of creating a conclusive presumption of felonious intent and removed from the jury's consideration the defense of bona fide mistake.[2] In direct contrast, the jury here was charged (R. 415):

> In order to convict him, you must first find beyond a reasonable doubt that he did so fail to report taxable income as charged, and that such failure was willful and intentional. The criminal law does not punish innocent mistakes, inadvertent errors, or mere negligence.
>
> Under the indictment in this case the accusation is made that the defendant acted wilfully, that is, with a bad purpose, and not merely mistakenly or carelessly.
>
> Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government.

In *Wardlaw* and *Morissette,* the point was preserved in the record by proper objection. No such objection was made here. (R. 420.)

The Court in *Wardlaw* (203 F. 2d, p. 887, fn. 5) recognized, by its reference to *Grayson* v. *United States,* 107 F. 2d 367, 370 (C. A. 8th), that the giving of the instruction with which we are here concerned does not of itself constitute a denial of justice. In

[2] The same is true of *Haigler* v. *United States*, 172 F. 2d 986 (C. A. 10th), and *Hubbard* v. *United States*, 79 F. 2d 850, 852–853 (C. A. 9th).

the *Grayson* case, *supra,* involving a prosecution under the Mann Act, the Court of Appeals held a similar instruction not to be prejudicial, since it clearly appeared from a consideration of the charge as a whole that the jury were told to determine the issue of felonious intent from the evidence as a whole. The Court of Appeals said (p. 370):

> The use of the words "presume" or "presumption" in this connection is not to be approved. No doubt *inferences* as to intent may be gathered from subsequent acts and conduct, but no *presumption* of law follows to invade and restrict the province of the jury. However, we do not think the language employed had that effect in the instant case. The question of the particular intent was not treated as a question of law, but as a matter to be submitted to and resolved by the jury. The charge as a whole must be considered. In this same paragraph the jurors are admonished that they would be justified in finding the intent only from all the evidence in the case. * * * [Emphasis supplied.]

We submit that a consideration of the charge and of the proceedings as a whole in the case at bar will satisfy this Court that no conclusive *presumption* of intent was imposed upon the jury. There were no expressions by the trial judge, such as there were in *Wardlaw* and *Morissette,* to indicate that the plea of honest mistake was no defense. On the contrary, the trial judge clearly left it to the jury to determine the presence or absence of willful intent from all the evidence, and the sentence in question, in its proper

context, simply told the jury that intent to evade was one possible *inference* which they might draw from appellant's failure to report all his taxable income.[3]

The trial court instructed specifically that the question of appellant's intent was for the jury to determine from "all of the facts and circumstances shown by the evidence." (R. 410–411.) Moreover, as previously noted, the court repeatedly charged the jury that "willfulness" within the meaning of Section 145 (b) meant intentional evasion of an additional tax owing (R. 409, 410, 412, 413) and specifically charged that mistake, carelessness, inadvertency or negligence did not constitute the intent requisite to conviction (R. 415). *Bateman* v. *United States, supra,* p. 70.

Considered in context, it is apparent that the instruction in question did not operate to withdraw the issue of intent from the jury or in any way inhibit their due consideration of the issue. The Government respectfully submits, therefore, that the instruction given was not error. By no stretch of reasoning can the instruction be considered plain error. Accordingly, appellant's total failure of objection to it forecloses consideration of the question by this Court. Rule 30, Federal Rules of Criminal Procedure. *Bateman* v. *United States, supra,* p. 70; *Gordon* v. *United States, supra.*

3. The court in *Wardlaw* v. *United States, supra,* after noting its disapproval of the instruction given, as previously discussed, set forth the following as a

[3] Whereas the *Wardlaw* instruction was, "* * * the natural *presumption* would be * * *" the instruction in the instant case was: "* * * the natural *inference* would be * * *." (R. 410.)

guide to proper instruction on the issue of intent in a tax fraud case (p. 887):

> The intent involved in this offense is not inherent in the act itself, but is a specific intent *involving bad purpose* and evil motive and *that* specific intent must be proved by or clearly inferred from the evidence. [Citing *United States* v. *Murdock*, 290 U. S. 389.] [Emphasis supplied.]

In the case at bar the jury was instructed (R. 410):

> Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the willfulness to make up the crime.
>
> Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with careless disregard for whether or not one has the right so to act.

In ascribing basis for reversal to the above instruction, it appears that this Court now considers plain error precisely that which the court in *Wardlaw* held essential to a proper charge on the question of willfulness. More important, the court's holding in this respect is at absolute variance with consistent precedent in this Circuit.

According to the Government's understanding, the Court reached its conclusion on the following reasoning:

In *Murdock* the Supreme Court was called upon to decide whether a willful refusal to supply information meant merely a voluntary or intentional refusal, as the trial court had charged, or whether it meant something more. In holding that in a criminal statute the term did mean something more than knowing or non-accidental, the Court advanced five wholly generic definitions, each supported by authority, among which were included those definitions used by the trial court in the instant case. Having done this, the Court separately defined "willfully" as meaning an act done with "evil motive." This definition was taken from *Felton* v. *United States,* 96 U. S. 697, 702, the same case from which the Court had taken "bad purpose," the first of the five generic definitions enumerated. The fact that in its ultimate holding in *Murdock* the Supreme Court used the terms "bad faith" or "evil motive" rather than "bad purpose" or "without justifiable excuse" is a distinction without difference. The sundry alternative definitions of willfulness presented by the Supreme Court in its opinion in *Murdock* were not idle obiter but were clearly intended as relevant to the decision reached and were obviously applied, in substance, in reaching that decision.

On page 6 of its opinion this Court says:

> In this Section 145 (b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade

> or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. * * *

However correct these observations may be, they do not fit the facts of this case. They ignore the fact that, as previously indicated, on six separate occasions the jury was told that the intent requisite to conviction entailed an intentional evasion of an outstanding tax liability. Here the jury was not told, singularly, that under the offense charged, willfully meant filing a false return with a "bad purpose" or "without justifiable excuse." Rather, these descriptive terms of mental state were given the jury within a total framework of instruction permeated with the principle that, to be found guilty, appellant must have intended to evade his true tax liability. The instruction in question should not be isolated from the charge as a whole. *Bateman* v. *United States, supra,* p. 70. If considered in context the instruction is not error.

In *Himmelfarb* v. *United States,* 175 F. 2d 924 (C. A. 9th), the trial court had charged (Himmelfarb R. 1578–1579):

> The word "wilfully" as used in the indictment and throughout these instructions simply means an intentional, conscious doing of the act prohibited, that is, intending the result which actually came to pass without ground for believing that it was lawful, or conduct marked

> by a careless disregard as to whether it is lawful or not, or deliberate unwillingness to discover and obey the law. Or, to express it another way, it means an act done with a bad purpose or with an evil motive to accomplish what the statute prohibits, without regard to what the law provides. * * *

In the *Himmelfarb* case, *supra,* this Court said in affirming the conviction (p. 951):

> The jury was fully instructed on requirements of proof, the element of wilfulness and the statute charged to have been violated.

This Court has previously approved an instruction almost the same, verbatim, as that here involved. In *O'Connor* v. *United States,* 175 F. 2d 477 (C. A. 9th), the instruction on intent was (Appellant's Br. 126–127):

> "Wilful" in the statute which makes a wilful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the wilfulness necessary to make up the crime. Wilfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful, and it also includes doing an act with careless disregard for whether or not one has the right to so act.

In *O'Connor* v. *United States, supra,* this Court affirmed the conviction stating (p. 479):

> The Court's instructions were full and fair and no objections were made to them when given as required by Rule 30 * * *.

In view of the foregoing, particularly the decisions of the Supreme Court and this Court, it is clear that there was no error in the trial court's charge on willfulness. Certainly there was no plain error therein. There having been no objection at trial to the court's instructions on that issue and no specification of them as error on appeal, they cannot serve as basis for reversal of the conviction. *Mitchell* v. *United States,* 213 F. 2d 951, 957 (C. A. 9th), certiorari denied, 348 U. S. 912; *Benatar* v. *United States,* 209 F. 2d 734, 744–745 (C. A. 9th), certiorari denied, 347 U. S. 974; *Kobey* v. *United States,* 208 F. 2d 583, 587–588 (C. A. 9th); *Bateman* v. *United States,* 212 F. 2d 61 (C. A. 9th); *O'Connor* v. *United States, supra; Gordon* v. *United States,* 202 F. 2d 596 (C. A. 9th), certiorari denied, 345 U. S. 998; and *Lash* v. *United States* (C. A. 1st), decided April 7, 1955 (1955 C. C. H., par. 9344).

CONCLUSION

Although the Court's judgment in this cause is correct, it is respectfully urged that the premises on which it rests are erroneous.

Wherefore, it is requested that this petition for rehearing be granted and the opinion of April 11, 1955, be appropriately modified.

Respectfully submitted.

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
JOHN H. MITCHELL,
FRED G. FOLSOM,
GEORGE WILLI,
Special Assistants to the Attorney General.

JACK D. H. HAYS,
United States Attorney.

MAY 1955.

CERTIFICATE OF COUNSEL

The undersigned, attorneys for the United States of America, petitioner herein, hereby certify that the foregoing petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
JOHN H. MITCHELL,
FRED G. FOLSOM,
GEORGE WILLI,
Special Assistants to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1955